

**ACCEPTED**  
Legal 2/23/10-22-04

BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA

Docket No. 2004-178-E

In re: )  
)  
South Carolina Electric & Gas )  
Company—Application for )  
Adjustments in the Company's )  
Electric Rate Schedules and Tariffs )  
)  
\_\_\_\_\_ )

**COLUMBIA ENERGY LLC'S  
REPLY TO MOTION TO COMPEL  
OF SCE&G**

SC PUBLIC SERVICE COMMISSION  
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Columbia Energy LLC ("Columbia Energy") replies to Applicant South Carolina Electric and Gas Company's ("SCE&G") motion to compel answers to interrogatories and requests to produce of Columbia Energy as follows and respectfully requests that the Public Service Commission of South Carolina ("Commission") deny the motion.

**BACKGROUND**

On September 16, 2004, SCE&G served its First Set of Interrogatories and Requests for Production on Columbia Energy. Columbia Energy answered the First Set of Interrogatories on October 1, 2004, and the First Requests for Production on October 22, 2004. SCE&G filed its motion to compel on October 14, 2004. Columbia Energy is filing its Supplemental Answers to SCE&G's First Set of Interrogatories simultaneously with this response. In SCE&G's motion it contends that Columbia Energy refused to answer certain interrogatories. Following is a summary of the interrogatories at issue:

**INTERROGATORY NO. 3:** Please identify each and every accounting adjustment referenced in the pre-filed testimony of the Company's witness Carlette Walker, which Columbia Energy, LLC will challenge or presently is considering challenging in this proceeding and provide a complete and detailed statement of the basis of the challenge.

**INTERROGATORY NO. 4:** Please identify and describe in detail each and every new tariff, rate or rate change which Columbia Energy, LLC will or anticipates that it will present to the Commission in this proceeding and provide a complete and detailed statement of the basis for the new tariff, rate or rate change.

**INTERROGATORY NO. 5:** Please identify and describe in detail each and every request for relief that Columbia Energy, LLC intends to make in this case and all legal and factual grounds for the request.

**INTERROGATORY NO. 6:** Please identify and specify in detail each and every document Columbia Energy, LLC intends to present into evidence in this proceeding.

**INTERROGATORY NO. 9:** Please specify each and every change that Columbia Energy, LLC will propose in any contract or agreement involving SCE & G and provide a complete and detailed statement of the basis for the change.

Columbia Energy objected to these interrogatories on the grounds that they sought information protected by the work-product privilege. In its supplemental answers, Columbia Energy informed SCE&G that the issues to be covered by its only witness, David Dismukes, are included in the pre-filed testimony which was filed with the Commission on October 11, 2004. As part of that filing and in compliance with the Commission's pre-filing order, Columbia Energy provided copies of the exhibits it intends to present into evidence. To the extent that these interrogatories seek to discover issues which may be raised by cross-examination or otherwise at the hearing in this matter such information is protected by the work-product privilege.

### **WORK PRODUCT PRIVILEGE**

SCE&G argues that it has a right to discover the claims and evidence that Columbia intends to advance at trial. SCE&G, not Columbia Energy, has the burden of proving the reasonableness of the adjustments and rate increases it seeks. S.C. Code §§ 58-27-820 & 58-27-870. SCE&G ignores the fact that Columbia Energy has complied with the Commission's own specific regulations and directives concerning the

pre-filing of testimony and exhibits. They also ignore the fundamental right of the attorney to protect his work product in preparation for trial.

The Commission's own regulations provide that hearing preparation working papers prepared for the pending proceeding are not discoverable. 26 S.C. Regs. 103-851A. The South Carolina Rules of Civil Procedure are incorporated by virtue of 26 S.C. Regs. 103-854 and govern all discovery matters not covered by the Commission's discovery regulations. S.C. Rules of Civil Procedure, Rule 26(b)(3), addresses the work product privilege and provides that the "court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." As this sentence indicates, the attorney's tactical evaluations, opinions, and mental impressions are considered opinion work product and protected against disclosure. James Flanagan, *South Carolina Civil Procedure*, 219 (2<sup>nd</sup> Ed. 1996).

The seminal work product case is *Hickman v. Taylor* in which the U.S. Supreme Court indicated that

it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference....This work is reflected, or course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer."

329 U.S. 495, 511 (1947).

Cases interpreting Rule 26(b) federal counterpart note that opinion work product prepared in anticipation of litigation is absolutely immune from discovery. *National Union*


*Fire Ins. v. Murray Sheet Metal*, 967 F.2d 980 (4<sup>th</sup> Cir. 1992). The issues which Columbia Energy will raise on direct examination are addressed in the testimony of David Dismukes and Columbia Energy has fully complied with this Commission's rules and directives concerning the pre-filing of testimony and exhibits. SCE&G is not permitted through discovery to invade the work product privilege to learn what issues Columbia Energy may raise through cross examination or otherwise at the hearing of this case.

### **CONCLUSION**

Columbia Energy respectfully requests that the Commission deny SCE&G's motion to compel responses for the reasons outlined above.

Dated this 22 day of October, 2004.

ROBINSON, McFADDEN & MOORE, P.C.

A handwritten signature in black ink, appearing to read "Frank R. Ellerbe, III", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

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This is to certify that I, Toni C. Hawkins, a paralegal with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below **Columbia Energy LLC's Reply to Motion to Compel of SCE&G** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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Dated at Columbia, South Carolina this 22nd day of October, 2004.

  
Toni C. Hawkins